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ABSTRACT

This paper explores some of the implications of Justice William O. Douglas's dissenting opinion in "DeFunis v. Odeggard" for the selection, education, and licensing of educational personnel. Douglas's argument for "cultural neutrality" in law-education selection instruments turns on his argument for racially neutral tests. That is, Douglas's argument appears to say that public institutions have a particular responsibility to make certain that they conduct their affairs on a culturally neutral basis where racial minorities are involved. With respect to the selection of students into teacher education programs, Douglas's opinion, if adopted by the full Court, would require substantial revision in institutional practices. Presently, college grades, English proficiency, and academic references are among the most commonly used criteria for selection of students. These appear not to meet the tests for adequacy that Douglas suggests in his opinion. While selection is an important phase in the training of teachers, Douglas's arguments are even more important with regard to certification or licensing. According to Freeman, Douglas's argument, when considered in the field of teacher education, would seem to make the use of such standardized and heavily relied upon examinations as the National Teacher Examination inappropriate. (JA)

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U. S. Supreme Court . . .

Douglas Discusses 'Cultural Neutrality' In Dissenting Opinion on DeFunis Case

By Larry Freeman
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The Supreme Court's decision in *DeFunis v. Odegaard* has been looked to to provide judicial resolution of controversial social issues. As has been widely reported, the Court majority found the case moot. However, the case raised substantial issues relevant to the focus of this newsletter. Because the rest of the newsletter had gone to press before the decision was reached, this supplement is provided in order to explore some of the implications of Justice William O. Douglas' dissenting opinion for the selection, education, and licensing of educational personnel.

Douglas' position can be characterized as having its source, in part, in a broad and liberal understanding of the profession of lawyering: "Professional persons, particularly lawyers, are not selected for life in a computerized society." This broad conception of the features of lawyering is made more specific in another of his statements: "The invention of substitute [for the currently relied upon Law School Admissions Test (L.S.A.T.)] tests might be made to get a measure of an applicant's cultural background, perception ability to analyze, *and his or her relation to groups* [emphasis added]." Douglas' vision of "minorities in our midst who are to serve actively in our public affairs . . . chosen on talent and character alone" does not appear to rest on stereotypic or highly universalized generalized notions of what constitutes being a lawyer; he does not accept the notion of the lawyer as an "organization man" working as a lawyer. In short, he is capable of imagining lawyering as a complex and diverse profession that is neither peculiar to nor exclusively dependent on features of the dominant culture. Thus, in applying the fourteenth amendment to the question of selecting law students, he writes:

"The clear and central purpose of the 14th Amendment was to eliminate all official state sources of invidious racial discrimination in the states." The law school's admissions policy cannot be reconciled with that purpose, unless cultural standards of a diverse rather than a homogeneous society are taken into account. The reason is that professional persons, particularly lawyers, are not selected for life in a computerized society. The Indian who walks to the beat of Chief Seattle of the Muckleshoot Tribe in Washington has a different culture than examiners at law schools.

Racial Neutrality Is Key—

The key to the problem is the consideration of each application *in a racially neutral way.* Since L.S.A.T. reflects questions touching on cultural backgrounds, the admissions committee acted properly in my view in setting minority applications apart for separate processing. These minorities have cultural backgrounds that are vastly different from the dominant Caucasian. Many Eskimos, American Indians, Filipinos, Chicanos, Asian Indians, Burmese, and Africans come from such disparate backgrounds that a test sensitively tuned for most applicants would be wide of the mark for many minorities.

"The Indian who walks to the beat of Chief Seattle of the Muckleshoot Tribe in Washington has a different culture than examiners at law schools . . . [and] a test sensitively tuned for most applicants would be wide of the mark for many minorities."

The melting pot is not designed to homogenize people, making them uniform in consistency. The melting pot, as I understand it, is a figure of speech that depicts the wide diversities tolerated by the First Amendment under one flag. Minorities in our midst who are to serve actively in our public affairs should be chosen on talent and character alone not on cultural orientation or leanings.

I do know, coming as I do from Indian country in Washington, that many of the young Indians know little about Adam Smith or Karl Marx but are deeply imbued with the spirit and philosophy of Chief Robert B. Jim of the Yakimas, Chief Seattle of the Muckleshoots, and Chief Joseph of the Nez Perce which offer competitive attitudes towards life, fellow man, and nature.

I do not know the extent to which Blacks in this country are imbued with ideas of African socialism. Leopold Senghor and Sekon

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Torae, most articulate of African leaders, have held that modern African political philosophy is not oriented either to Marxism or to capitalism. How far the reintroduction into educational curricula of ancient African art and history has reached the minds of young Afro-Americans I do not know. But at least as respects Indians, Blacks, and Chicanos—as well as those from Asian cultures—I think a separate classification of these applicants is warranted, lest race be a subtle force in eliminating minority members because of cultural differences.

Used To Eliminate Jews—

Insofar as L.S.A.T. tests reflect the dimensions and orientation of the Organization Man they do a disservice to minorities. I personally know that admissions tests were once used to eliminate Jews. How many other minorities they aim at I do not know. My reaction is that the presence of an L.S.A.T. test is sufficient warrant for a school to put racial minorities into a separate class in order better to probe their capacities and potentials.

. . . . . .

. . . The selection committee might conclude that the population of Washington is now 2 per cent Japanese, and that Japanese also constitute 2 per cent of the bar, but that had they not been handicapped by a history of discrimination, Japanese would now constitute 5 per cent of the bar, or 20 per cent.

Or alternatively the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard the current University of Washington policy would almost surely fall, for there is no western state which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner. This Court has not sustained a racial classification since the wartime cases . . . involving curfews and relocations imposed upon Japanese-Americans.

"The invention of substitute tests [for the Law School Admissions Tests now used] might be made to get a measure of an applicant's cultural background, perception, ability to analyze, and his or her relation to groups."

Nor obviously will the problem be solved if next year the law school included only Japanese and Chinese, for then Norwegians and Swedes, the Poles and the Italians, the Puerto Ricans and the Hungarians, and all other groups which form this diverse nation would have just complaints.

The key to the problem is consideration of such applications *in a racially neutral way*. Abolition of the L.S.A.T. test would be a start. The invention of substitute tests might be made to get a measure of an applicant's cultural background, perception, ability to analyze, and his or her relation to groups. They are highly subjective, but unlike the L.S.A.T. they're not concealed but in the open.

A law school is not bound by any legal principle to admit students by mechanical criteria which are insensitive to the potential of such an applicant which may be realized in a more hospitable environment. It will be necessary under such an approach to put more effort into assessing each individual than is required when L.S.A.T. scores and undergraduate grades dominate the selection process.

Douglas' argument for "cultural neutrality" in law-education selection instruments turns on his argument for racially neutral tests

". . . As respects Indians, Blacks, and Chicanos—as well as those from Asian cultures—I think a separate classification of these applicants is warranted, lest race be a subtle force in eliminating minority members because of cultural differences."

—"lest race be a subtle force in eliminating minority members because of cultural differences." That is, Douglas' argument appears to say that public institutions have a particularly sharp responsibility to make certain that they conduct their affairs on a culturally neutral basis where racial minorities are involved. The creation and use of non-neutral instruments where members of non-mainstream cultures are involved—the failure to respond to culture—may be an indirect expression of racial discrimination—"eliminating minority members because of cultural differences."

Douglas himself suggests that the arguments he develops might well be applicable to professions other than lawyering when he observes that "professional people . . . are not selected for life in a computerized society." His arguments might reasonably apply to education professions as well as any other profession. Further, his arguments would likely be even weightier in another case where the plaintiff was seeking remedy under not only the Fourteenth Amendment but also under the more explicit provisions of Title VII of the Civil Rights Act.

With respect to the selection of students into teacher education programs, Douglas' arguments, if adopted by the full Court, would require substantial revision in institutional practices. Presently, according to Martin Habermann, college grades, English proficiency and academic references are among the most commonly used criteria for selection of students. These appear not to meet the tests for adequacy that Douglas suggests in his opinion. While selection is an important phase in the production of teachers, Douglas' arguments are even more important with regard to certification or licensing. When Douglas establishes the criteria that the selection of law students must be "racially neutral" he proceeds, through the argument we have analyzed, to imbue that phrase with a meaning that is substantially the same as the meaning attributed to "culturally neutral" in the article that appears on pages 6 through 14 in this newsletter.

Douglas' arguments would be more helpful and perhaps more important if they were addressed to the bar examination as opposed to the L.S.A.T. If he were to develop essentially the same argument in that situation as in this one, it would seem that the use of such standardized and heavily relied upon examinations as the National Teacher Examination (NTE) would be found inappropriate; further, since the NTE, according to its developers, is designed to test for knowledge acquired in a typical teacher education program, the conventionally required courses are open to challenge, and likely a successful challenge, particularly in light of the Equal Employment Opportunity Commission's inclusion of "specific educational requirements" in the meaning of "test."